STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee Appellant/Cross-

Supreme Court No. 141122

Court of Appeals No. 290031

Lower Court No. 07-28869FC

-vs-

NAYKIMA TINEE HILL
Defendant-Appellant. Appellee/Cross-

SAGINAW COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

GAIL RODWAN (P28597)
Attorney for Defendant-Appellant

141122 (51)
XA PDL
6/29
State

NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL AS CROSS-APPEALLANT

OPINION OF COURT OF APPEALS

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

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Defendant-Appellant answers, "Yes."

II. **DID THE TRIAL COURT VIOLATE DEFENDANT'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE BY DENYING HER MOTION TO APPOINT AN EXPERT WITNESS ON EYEWITNESS IDENTIFICATION? DID THE TRIAL COURT ABUSE ITS DISCRETION IN DECIDING WHETHER TO APPOINT AN EXPERT BY FAILING TO EXERCISE THAT DISCRETION?**

Defendant-Appellant answers, "Yes."

STATEMENT OF FACTS

In a September – October 2006 jury trial before Judge William A. Crane in Saginaw County Circuit Court, Defendant-Appellant Naykima Tinee Hill was convicted on one count each of: home invasion, MCL 750.110a(2); assault and battery, MCL 750.81; unlawful imprisonment, MCL 750.349b; and extortion, MCL 750.213. The jury also convicted Ms. Hill on three counts of armed robbery, MCL 750.529. At sentencing, the court imposed terms of 25-60 years on each of the armed robbery counts (Counts IV, VII, and VIII); 14-22 years for the unlawful imprisonment (Count III); 20-30 years for the home invasion (Count I); and 20-30 years for the extortion (Count V). The court imposed a sentence of 93 days time served on the misdemeanor assault (Count II).

The prosecution argued that Ms. Hill pushed her way into the home of Sherry Crofoot in the early morning of March 7, 2007, and robbed Ms. Crofoot, her daughter Samantha Crofoot, and Ms. Crofoot's grandmother, Florence Klarien. The prosecution said that Ms. Hill punched Ms. Klarien in the face until her nose bled; dragged Sherry Crofoot into a bedroom and pinned her on the bed; picked up a knife that was lying on a bedside table and put it to Sherry's throat; threatened to kill Sherry in front of Samantha, unless someone gave her money; and left the house with money, jewelry, and a purse taken from the victims. Ms. Hill did not dispute that the attack occurred, but contended that someone else committed the crimes charged, and that the complainants misidentified her as the guilty party.

Pre-trial Motions

Ms. Hill made an oral motion on February 12, 2008 for the trial court to appoint an expert witness on eyewitness identification. The trial court denied the motion as untimely. (Order Denying Defendant's Motion for Court Appointed Expert Witness on Eyewitness Identification,

March 4, 2008.) The trial court ordered a stay of proceedings on March 4, 2008, so that Ms. Hill could appeal its order denying appointment of the expert witness, and Ms. Hill filed an application for leave to appeal on March 17, 2008. The Court of Appeals denied leave on May 29, 2008, on the basis that Ms. Hill had failed to persuade the court of the need for immediate review of the issue.

Hearsay Statement of Jacqueline Sistrunk

The prosecutor called Patrol Officer James Livingston of the Saginaw City Police Department to testify regarding his investigation of the home invasion and robbery incident. (T IV 16.)[1] Livingston testified that a witness he interviewed — Tiesha Washington — called him the day after the incident to report that she had found a coat and knife that did not belong to her in the closet of her home. (T IV 22, 25.) Livingston identified a coat and knife offered in evidence by the prosecutor as those that he seized from Ms. Washington's home. (T IV 25-27.) On cross-examination, Livingston also testified that officers under his supervision had knocked at the door of 407 1/2 North Porter Street — Ms. Washington's residence — on the morning of the incident, but that nobody responded to the knock. (T IV 32-33.) When Ms. Washington arrived home later on the morning of March 7th, Livingston directed officers to search inside the residence on her consent, but they did not find either the coat or the knife that Ms. Washington reported and turned over to him the next day. (T IV 34-36.)

Livingston further testified that he had photographs taken of another coat — brown leather with a fur-trimmed hood — that he observed at 1003 North Bond Street, where Saginaw

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[1] Citations to "T I" through "T VII" refer to the transcript of the seven day jury trial held on September 23 – 26 and September 30 – October 2, 2008.

City Police arrested Ms. Hill. (T IV 63-66.) Livingston also stated that when he had Ms. Hill photographed at the Saginaw City Police Station after her arrest, she was wearing a maroon jacket with yellow sleeves, as shown in photographs entered into evidence. (T IV 68-69.) Defense counsel asked Livingston on cross whether he had any contact with Jacqueline Sistrunk — a black female living at the Bond Street address and present when the Saginaw City Police arrested Ms. Hill — and why Livingston had photographs taken of the brown leather coat found at 1003 North Bond:

> *Q.* Did you have contact with a person by the name of Jacqueline Sistrunk?
>
> *A.* Yes, sir, I did.
>
> *Q.* Did you ever take or have taken a photograph of a coat of hers? I guess page five, middle paragraph. No, not the middle paragraph. Just slightly below. [Referring the witness to a copy of his report of the investigation — see T IV 66.]
>
> *A.* Right here?
>
> *Q.* Yeah.
>
> *A.* She was dating the guy.
>
> *Q.* Oh, okay. So there's a particular reference to a coat by Ms. Sistrunk?
>
> *A.* Yes.
>
> *Q.* But that was not her coat, but that belonged to her boyfriend, Mr. Jackson?
>
> *A.* They were in a relationship living at [1003 North Bond].
>
> *Q.* I see, I see. But that was a coat that she had worn or not?
>
> *A.* Yes.
>
> *Q.* Can you speak up?
>
> *A.* Yes.
>
> *Q.* So it wasn't — the reason you had a picture taken, even though it was Mr. Jackson's coat, it was worn by Ms. Sistrunk, because that's why you had the picture taken?

A. I took the picture, according to the description I received. When I walked into the house that I see something that might look like evidence, and it might be important, like the knife, let's get a picture of it.

* * *

Q. And how many people were at the Bond Street residence when the police arrived, if you know?

* * *

A. Five including the kids.

Q. Five including the kids. Was Ms. Sistrunk there?

A. Yes, she was. [T IV 70-72.]

Upon redirect examination the prosecutor asked Livingston to read from his report part of a statement made to him by Ms. Sistrunk during his interview with her, and Ms. Hill objected to the proposed answer. (T IV 73-76.) The sentence in the report reads:

> Sistrunk states earlier [on the day before the incident] that Hill came by her house and had dinner with them. When asked about what [Hill] was wearing, Sistrunk described a brown-hooded coat with fur around it saying, "It looks just like mine, but real dirty." [T IV 76.]

The trial court ruled that the prosecutor could ask the witness to read this passage from the report "in rebuttal." (T IV 78.) The prosecutor then continued his redirect examination of Livingston:

Q. Detective Livingston, before we broke in the morning, I was asking you concerning the statement that you had taken from Ms. Sistrunk, is that correct?

A. Yes, sir, that's correct.

Q. When did you take that statement?

A. That day, sir.

Q. That day being March 7th?

A. Yes, sir.

Q. In that statement she referred to a brown-hooded coat with fur around it, is that correct?

A. Yes, sir, that's correct.

Q. Whose coat was she talking about? Whose coat was it that she was talking about?

A. The one Ms. Hill was wearing.

Q. That would be the defendant?

A. Yes, sir. [T IV 113-14.] [Emphasis added.]

Expert Testimony of Trooper Steven Escott

Ms. Hill did not dispute that someone attacked and robbed the complainants, but contended only that they had misidentified her as that person. (T III 42.) In addition to the eyewitness testimony of the complainants, the prosecutor offered the expert testimony of Trooper Steven Escott, of the Michigan State Police K-9 Division, as evidence relevant to determining the element of identity in each of the offenses charged. (T III 4, 14-16.) Ms. Hill objected to the testimony, but the trial court overruled and allowed it.

Trooper Escott testified that on March 7, 2007, at around 7:00 a.m., he responded to a call for K-9 assistance with locating a suspect in an alleged home invasion. (T III 18.) The prosecutor first adduced testimony from Escott regarding (1) his experience and qualifications as a dog handler; (2) the training he and his dog, Enzo, had taken with the Michigan State Police K-9 Division to become certified in tracking; and (3) the circumstances and conditions surrounding their assigned tracking task. (T III 15-19.) The prosecutor further adduced testimony from Escott regarding the start of a trail that the trooper and his dog found at the scene of the incident:

Q. So what happened in this case?

A. In this case, we had a light dusting of snow, and I believe it was Officer Shaltry, I believe it was, that gave me a brief description, briefed me as to what took place, and we had an actual starting point where we had a footprint where I could start the dog.

Q. So you had some sort of circumstances indicating that whoever had done this had been at that point, correct?

A. That's correct. [T III 18-19.] [Emphasis added.]

Following voir dire by both counsel, Ms. Hill renewed her objection to the admission of the testimony, but the trial court again overruled the objection and qualified Escott as an expert in dog handling. (T III 26-27.) The prosecutor then elicited testimony that Enzo and Escott followed the trail that they had identified, first from 1014 Cleveland Street to 407 1/2 North Porter, then from there to 1003 North Bond, arriving at a house where Escott saw officers of the Saginaw City Police Department taking a female into custody. (T III 27-30.) Escott also testified that his dog lost the trail "for unknown reasons" somewhere within the front yard of 1003 North Bond, and that the dog found no new trail leading away from that area. (T III 30.) Finally, the prosecutor argued in his closing that the jury should consider Escott's testimony about following the trail with the dog as bearing on the issue of identity:

> *The Prosecutor*: [Defense counsel] talked about the dog. I think the dog's name was Enzo, if I remember right. He talked about oh, there was casting that was done.
>
> Remember the testimony of the dog's handler, Trooper Escott who testified that the dog went directly from Cleveland to Porter, then directly up Porter, and we have it cut off here but it eventually then makes a left hand turn and goes to Holland.
>
> And after that the defendant was taken away he then did the casting, looking around to see if there was any other scent, didn't find any. Why? *Because there was no scent to find. Enzo followed the scent from Cleveland to Porter to North Bond where she was found.*
>
> * * *
>
> You also have to believe, assuming that the police and the dog are correct . . . that of all the houses and all the streets in Saginaw, that Ms. X wanders into North Bond. *The same house that the defendant just happens to be at.* [T V 128-29, 135.] [Emphasis added.]

Following Ms. Hill's conviction and sentencing, she appealed of right in a three-issue brief to the Court of Appeals. In an unpublished, per curiam opinion of May 11, 2010, the Court

of Appeals reversed the convictions on the basis of a Sixth Amendment Confrontation Clause violation. The prosecution filed an Application for Leave to Appeal on or about May 24, 2010.

Naykima Hill now cross-appeals on the remaining two issues raised in the Court of Appeals.

I. **THE TRIAL COURT VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY ADMITTING EXPERT TESTIMONY ON THE BEHAVIOR OF A POLICE TRACKING DOG WITHOUT AN ADEQUATE SHOWING OF RELIABILITY AND RELEVANCE. THE TRIAL COURT FAILED TO PERFORM ITS GATE-KEEPING FUNCTION TO REQUIRE A RELIABLE SCIENTIFIC BASIS FOR THE EXPERT TESTIMONY. EVEN IF THE TRIAL COURT PROPERLY FOUND THE TESTIMONY RELIABLE, IT FAILED TO EXCLUDE IRRELEVANT EXPERT TESTIMONY THAT CONFUSED THE ISSUES AND MISLED THE JURY.**

Standard of Review

Questions of constitutional law are reviewed de novo. *People v Drohan,* 475 MIch 140, 146 (2006). The trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion. *People v Small,* 467 Mich 259, 261-262 (2002). Where the decision regarding the admissibility of evidence involves a preliminary question of law, that question is reviewed de novo. *People v Lukity,* 460 Mich 484, 488 (1999). The admission of evidence that is inadmissible as a matter of law is by definition an abuse of discretion. *Id.* But the defendant must show, in the context of the untainted evidence, that is more probable than not that a different outcome would have resulted without the error. MCL 769.26; *Lukity*, *supra* at 495-496.

This issue was preserved when Ms. Hill objected to the qualification of Michigan State Trooper Steven Escott as an expert witness on grounds that the prosecutor had not established the required basis for the admission of expert testimony set forth by Michigan Rules of Evidence 104(a) and 702, as elaborated in *Gilbert v Daimler-Chrysler Corp,* 470 Mich 749 (2004). (T III 8-11.)

Legal Standard

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the right to a fair trial in a fair tribunal. *Alley v Bell,* 307 F3d 380, 386 (CA6, 2002), citing *In re Murchison*, 349 U.S. 133, 136 (1955).

The Michigan Rules of Evidence require that a trial court examine the admissibility of evidence before deciding to admit it. MRE 104(a). The ruling to admit or exclude evidence may constitute error where it affects a substantial right of a party, and the party makes a timely objection to the ruling. MRE 103(a). The trial court may admit any relevant evidence, but must exclude all irrelevant evidence. MRE 402. Relevant evidence means any evidence tending to make the existence of any fact of consequence to determination of the action either more or less probable than it would be without the evidence. MRE 401. Moreover, the trial court may exclude even relevant evidence on finding its probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. MRE 403. Regarding the testimony of an expert witness, MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will *assist the trier of fact* to understand the evidence or *to determine a fact in issue*, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is *based on sufficient facts or data*, (2) the testimony is the *product of reliable principles and methods*, and (3) the witness has *applied the principles and methods reliably* to the *facts of the case*. [Emphasis added.]

Michigan Rule of Evidence 703 further requires that, "the facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence."

The Michigan Supreme Court has held that a trial court must act as a gate-keeper to ensure that all expert testimony admitted at trial is reliable. *Gilbert*, *supra* at 780, citing *Daubert v Merrell Dow Pharms, Inc*, 509 US 579, 589 (1993). The trial court has some discretion in carrying out this role, but may not perform it inadequately or refuse to perform it at all. *Id.*, citing *Kumho Tire Co v Carmichael,* 526 US 137, 158-159 (1999) (Scalia, J., concurring). Michigan Rules of Evidence 104 and 702 mandate that the trial court perform this role prior to admitting any expert testimony. *Id.* at 780-781. The party offering expert testimony bears the burden of showing its admissibility and its relevance to the determination of matters at issue in the case. *Id.*

at 781. The party must make this showing for all expert testimony and must meet the standards set forth in *Daubert* and *Kumho*, codified in MRE 702, and adopted by the Michigan Supreme Court in *Gilbert*. 470 Mich 781; MRE 702, Staff Comment to 2004 Amendment.

Moreover, the trial court must perform its gate-keeping role with regard to all stages of expert testimony. *Gilbert*, *supra* at 782. Michigan Rule of Evidence 702 mandates that the trial court perform a searching inquiry into both the data on which an expert renders his opinion and the manner in which the expert interprets and extrapolates from that data. *Id.* The party offering expert testimony may not rely on a mere showing that the expert's opinion rests on data viewed as legitimate within his area of expertise, but must go further and show that it expresses conclusions derived from that data through reliable principles and methodology. *Id.* Nothing in either *Gilbert-Daubert* or the Michigan Rules of Evidence requires a trial court to admit an expert opinion on the unsubstantiated claim of the expert alone as to its reliability. See *Id.* at 783, citing *General Elec Co v Joiner,* 522 US 136, 146 (1997).

Analysis

The trial court abused its discretion in admitting Escott's testimony, because it failed to require a sufficient inquiry into the reliability of that evidence and because the testimony had no relevance to the central issue of identity. First, the trial court abused its discretion by failing to require a substantial inquiry — or any inquiry at all — into the objective basis for the reliability of the testimony. The trial court instead overruled Ms. Hill's objection and found the testimony admissible on the basis of authority presented by the prosecutor, including annotations to CJI2d 4.14; *People v Sands,* 82 Mich App 25 (1978); *People v McPherson,* 85 Mich App 341 (1978); and "many other cases." (T III 7, 11-14.) In explaining its ruling, the trial court also noted that it considered the testimony "probably just supplementary" to eyewitness testimony already given by the complainants. (T III, 14.)

Second, the trial court abused its discretion in admitting this testimony, because it was inadmissible as a matter of law. Viewed in the most generous light, the testimony shows at most that the tracking dog followed *some* human track over the route described. But neither the testimony of the dog handler as to his own observations nor his interpretation of his dog's behavior bear on the issue of *who* walked the route that the dog and handler followed. The dog here never "alerted" to the defendant or to any other person at any point along the track that it followed, and it therefore never gave any indication of who might have left that track, despite the fact that the police took Ms. Hill into custody in the presence of the tracking dog and Trooper Escott. The handler also never testified that the dog gave him any indication: (1) how old the track was that it followed; (2) whether it followed the same continuous track or two separate tracks from Cleveland, to Porter, and then to North Bond; (3) whether the track was broken or continuous; or (4) why the track mysteriously ended at an unspecified point in the front yard of the North Bond residence. The testimony of the handler therefore could not help the jury at all to determine the crucial fact at issue — the identity of the person who committed the crimes charged. Moreover, a curative instruction that testimony has "little value as proof"[2] cannot cure the error of admitting prejudicial and irrelevant testimony that has no value as proof at all.

Moreover, this error was not harmless, because it suggested a compelling, prejudicial, and invalid inference that the person who committed the crimes also walked the path that the dog followed, and that the person who did both of these things was Ms. Hill. The danger that this

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[2] The trial court gave the standard jury instruction on tracking dog evidence, as required by *People v Perryman*, 89 Mich App 516, 524 (1979):

> You have heard testimony about the use of a tracking dog. You must consider tracking dog evidence with great care and remember that it has little value as proof. Even if you decide it is reliable, you must not convict the defendant based only on tracking dog evidence. There must be other evidence that the defendant is guilty. [T VI 13.]

testimony confused the issues and misled the jury therefore far outweighed any probative value it could have had. Despite the court's instructions, the jury likely did not view this evidence skeptically[3] and could only have considered it as corroborating the eyewitness identifications of Ms. Hill — as indeed the prosecutor intended that the jury would when introducing it, and as the trial court expected that they would when admitting it. When the trial court admitted this irrelevant evidence from which the jury could draw no proper or permissible inference, it violated Ms. Hill's due process right to fundamental fairness in her trial. *Jammal v Van de Kamp,* 926 F2d 918, 919-20 (CA9, 1991).

A. The Trial Court Failed to Perform its Gate-keeping Function of Requiring a Reliable Scientific Basis for the Expert Testimony.

The trial court allowed Trooper Escott's testimony based on the holding of *People v Harper,* 43 Mich App 500 (1972), and its progeny. (T III 7, 11-14.) But while the *Harper* court set forth a framework of inquiry for establishing the admissibility of testimony related to the behavior of tracking dogs, it did not evaluate such evidence as expert testimony, but instead based its holding only on the great weight of authority from other jurisdictions that had found such evidence admissible:

> [A]fter an extensive examination of the authorities from other states, we are in accord with the weight of authority that, upon a proper foundation being laid, tracking-dog evidence is admissible in criminal cases.

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[3] In *McPherson*, the court noted the special problems of tracking dog testimony:

> The principal objections to the use of bloodhound evidence [include] . . . that *the jury, due to the superstitious awe with which people regard the actions of animals, are likely to give more weight to such evidence than it is entitled to, particularly where it is introduced in connection with some heinous crime* about which there has been much public indignation and excitement . . . . [85 Mich App 345-346, quoting 18 ALR3d 1221, 1223-24, superseded by 81 ALR5th 563.] [Emphasis added.]

> In order to safeguard the reliability of tracking-dog evidence, it must be shown as a condition precedent to its admissibility that: (1) the handler was qualified to use the dog; (2) the dog was trained and accurate in tracking humans; (3) the dog was placed on the trail where circumstances indicate the alleged guilty party to have been; and, (4) the trail had not become so stale or contaminated as to be beyond the dog's competency to follow it. [*Harper*, *supra* at 508.]

The *Harper* court did not mention the "general acceptability" standard for admission of scientific evidence, which the Michigan Supreme Court adopted in *People v Davis,* 343 Mich 348 (1955), and which followed the principle set forth in *Frye v United States,* 54 App DC 46 (1923). But prior to the 2004 amendment of MRE 702, the *Davis-Frye* standard applied only to scientific evidence derived by "novel" methods or procedures. See *Gilbert*, *supra* at 781. The holding of *Harper* therefore did not conflict with the rule of *Davis-Frye*, if the *Harper* court found tracking dog evidence so widely revered as to leave no question on its "general acceptability." Indeed, later Court of Appeals holdings expanding on *Harper* took this view. See, e.g., *McPherson*, *supra* at 346-347 (quoted by the trial court at T III 11-13).

Moreover, in 17 opinions following, expanding, or analyzing the *Harper* rule on tracking dog testimony,[4] the Michigan courts have not examined such evidence in light of both the *Harper* rule *and* the *Gilbert-Daubert* standard — now codified in MRE 702.[5] Although *Harper* set forth a valid framework of inquiry for ensuring the reliability of tracking dog evidence, it

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[4] *People v Warinner*, 461 Mich 885 (1999); *People v King*, 215 Mich App 301 (1996); *People v Stone*, 195 Mich App 600 (1992); *People v Laidlaw*, 169 Mich App 84 (1988); *People v McMillen*, 126 Mich App 211 (1983); *People v O'Brien*, 113 Mich App 183 (1982); *People v Riemersma*, 104 Mich App 773 (1981); *People v McRaft*, 102 Mich App 204 (1981); *People v Coleman*, 100 Mich App 587 (1980); *People v Joyner*, 93 Mich App 554 (1980); *People v Plantefaber*, 91 Mich App 764 (1979); *Perryman*, *supra*; *McPherson*, *supra*; *People v Orsie*, 83 Mich App 42 (1978); *Sands*, *supra*; *People v Norwood*, 70 Mich App 53 (1976); *Harper*, *supra*.

[5] The defendant-appellant in *Perryman* argued that tracking dog evidence "is scientific in nature, and lacks the requisite unimpeachable validity necessary to justify its admission . . . ." But the Court of Appeals did not review this issue, because the defendant-appellant did not object to admission of the evidence on this basis at trial. 89 Mich App at 520-521.

addressed only the subjects and not the substance of that inquiry. The *Harper* rule guides — but does not replace — the fundamental scrutiny for reliability and relevance that the trial court must carry out before admitting any evidence, and which it must pursue with special care in the case of expert testimony. Properly applied, the foundation set forth in *Harper* provides a valid means for conducting the required analysis of reliability and relevance pursuant to MRE 702 and 403. But a mechanical recitation of the *Harper* elements cannot substitute for a searching inquiry conforming to the underlying philosophy of the Michigan Rules of Evidence. *People v Warinner,* 461 Mich 885, 893 (1999) (Kelly, J., dissenting).

Rather than carrying out the proper substantial inquiry for reliability and relevance, the trial court ignored the substance of this inquiry, contravening the mandate of MRE 702 and *Gilbert-Daubert*, when it failed to require that the prosecutor produce objective data to support Escott's claims that he was qualified to handle his dog, and that his dog was trained and accurate in tracking humans.[6] The court instead admitted the testimony based solely on Escott's statements that he and his dog had been trained and certified by the Michigan State Police K-9 Division. (T III 15-17.) While the court may consider the expert's licensing or certification in his field as relevant evidence of his qualifications to testify, licensing and certification are not dispositive on the reliability of the offered testimony, and cannot alone satisfy the *Gilbert-Daubert* requirement for a searching inquiry and a finding of reliability based on objective data. See *Mulholland v DEC Int'l Corp,* 432 Mich 395, 403-404 (1989). Moreover, the trial court abused its discretion in deciding what criteria to use to establish the reliability of expert

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[6] The trial court cut short defense counsel's argument on the issue with the comment that, "I've asked you for authority that says you cannot have a tracking dog, not Daubert theory and all of that. The courts have already decided this issue, so I'm overruling the objection and it will be received." (T III 13-14.)

testimony by not exercising that discretion at all — making no substantial inquiry into the reliability of Escott's methods and conclusions. The failure to exercise discretion is by definition an abuse of discretion. *People v Stafford,* 434 Mich 125, 134 n 4 (1990).

Finally, beyond abusing its discretion in deciding what criteria to apply, the trial court also violated the Due Process Clause of the Fourteenth Amendment by admitting this testimony on the basis of a mechanical application of the per se rule set forth in *Harper*, rather than making a proper substantial inquiry into its reliability and relevance. See *Alley*, *supra* at 394.

The failure of the trial court to properly scrutinize this tracking dog evidence poses a special cause for concern, because Ms. Hill had no chance to evaluate the conclusions of the dog handler by submitting the physical evidence concerned, or even an objective record of the observations made, to an independent analysis performed by her own expert. Unlike other forms of expert testimony, such as DNA analysis, the testimony of the tracking dog handler here rested solely on the handler's own memory — of the dog's behavior; his interpretation of that behavior; and the circumstances surrounding that behavior and interpretation. The prosecutor did not offer the transient soil and airborne scents smelled by the dog into evidence, and the defendant could not therefore get a "second opinion" on the significance of this physical evidence from an equally trained and competent tracking dog in her own employ. Moreover, the prosecutor offered no tangible, objective record of the tracking activity, which would have allowed another qualified handler to examine and opine on the results of the track.

Because Ms. Hill had no chance to properly probe and question the physical evidence on which this expert based his opinion, the trial court should have allowed the tracking dog evidence, if at all, only after the most searching, rigorous, and skeptical inquiry contemplated by MRE 702 and *Gilbert-Daubert*. In so doing, the court should have required that the prosecutor

inform its ruling with complete and substantial objective data regarding the reliability and accuracy of the dog and handler team, in the context of the assigned tracking task, before allowing the handler to testify as to the dog's behavior.

B. The Trial Court Failed to Exclude Irrelevant Expert Testimony that Confused the Issues and Misled the Jury.

Besides failing to scrutinize Escott's testimony for reliability, the trial court also failed to ensure that it bore any relevance to the facts at issue in the case. The *Harper* foundational test for admissibility of tracking dog evidence addresses only the reliability of that evidence, not its relevance. The trial court must still follow the fundamental relevance standard of MRE 401 and MRE 402, along with the relevance prong of the test set forth by MRE 702 and *Gilbert-Daubert*, when ruling on whether to admit any expert testimony. Here the trial court made no inquiry at all on the relevance of the tracking dog testimony to the issue of identity — the central and only issue disputed by Ms. Hill. Indeed, Escott's testimony included no opinion on the issue of identity, either from the behavior of his dog or his own observations.

First, even if the jury accepted Escott's testimony as reliable, it shows at most that some human path existed along the route described and that the dog followed that path. But the path ended at some unspecified point in the front yard of 1003 North Bond and did not extend either to the house or to any other point. Moreover, Escott stated on cross that he left the track and went to the front yard of North Bond with his dog in order to assist other officers who were dealing with Ms. Hill. He further stated that only after the officers had arrested Ms. Hill did he and the dog try to reacquire and follow the track from the point where they diverted. (T III 39-41.)

Second, Escott testified that he could not identify the female that he saw arrested at 1003 North Bond. (T III 30.) Moreover, unlike in *Harper*, where the tracking dog alerted to the

defendant at the end of the trail,[7] here the dog never signaled that any person at 1003 North Bond matched the scent that he had followed.

Because the track that the dog followed did not lead directly to where the police found Ms. Hill, and because neither Escott nor his dog recognized or identified her, none of this testimony identified Ms. Hill as the person who left the track. Ms. Hill never disputed whether some person attacked the complainants, or whether that person might have followed part or all of the route tracked by the dog in fleeing the scene. So this evidence therefore could not have helped the jury to decide the sole, central fact at issue in this case — the identity of the person who did those things. See *Norwood*, *supra* at 56.

C. The Trial Court's Decision to Allow the Tracking Dog Testimony Was Not Harmless Error, Because it Suggested a Prejudicial and Invalid Inference as to the Identity of the Person who Committed the Crimes.

The trial court's improper admission of the tracking dog testimony was not harmless error, because this testimony supplied the only direct evidence that could "connect the dots" between the scattered bits of circumstantial proof that in the prosecutor's theory linked Ms. Hill to the scene of the crime. Without this testimony, the prosecutor had no physical evidence showing a clear connection between the scene of the crime at 1014 Cleveland; the coat and knife that were found in a locked, unoccupied residence around the corner; and Ms. Hill, whom the Saginaw City Police arrested for an unrelated incident at 1003 North Bond — seven blocks away. Without the tracking dog testimony to connect the dots, it is more likely than not that the jury would have found the scattered bits of circumstantial evidence — the questionable eyewitness identifications of the victims;[8] the lone boot print at the scene matching a pair of

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[7] *Harper,* 43 Mich App 503; see also *Laidlaw*, *supra* at 91, 94.
[8] See *infra* Issue II.

boots that Ms. Hill said did not even belong to her; and the coat and knife found a day later, in a house that Ms. Hill testified she had never entered — not enough on which to conclude beyond a reasonable doubt that Ms. Hill was the person who committed the crimes charged.

The tracking dog testimony thus provided a crucial element of corroboration and continuity to the prosecutor's theory that the perpetrator of the crime had walked from the house where the crime happened, to the house where the coat and knife were found, and thence to the house where the police arrested Ms. Hill. The prosecutor also argued in his closing that the dog testimony ruled out the possibility that someone other than Ms. Hill had walked that route and continued on to somewhere else, and that the dog's failure to locate a trail leading away from 1003 North Bond showed that the perpetrator must have been one of the persons present in that house. The prosecutor's only other physical evidence connecting Ms. Hill to the scene of the crime was a pair of boots taken from her at the police station, the soles of which the prosecutor said matched a photograph of a footprint in the snow found at the scene.[9] (T V 133.) Escott testified that he noted prints that matched the one at the scene at points along the route that the dog followed. (T III 28-29.) But the prosecutor did not present photographs of any prints matching the boots in evidence other than the lone print found at the scene. Moreover, no witness testified that any footprints led to the front yard of 1003 North Bond, to the door of the house, or to a location where the police found and arrested Ms. Hill.[10]

D. The Court of Appeals Failed to Address the Substance of This Issue, FindingOnlyThat the Trooper Did Not Testify As An Expert Witness.

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[9] Ms. Hill testified that the boots did not fit her, and that she only put them on when police ordered her to in the course of taking her into custody at 1003 North Bond. (T V 36-38.)

[10] But cf. *Orsie*, *supra* at 45-46 (noting that the officer there followed visible and distinctive prints for the entire route, and was only "aided" by his dog).

The Court of Appeals dismissed this issue in one paragraph (see Slip opinion at 3), concluding that even though Trooper Steven Escott was qualified at trial as an expert in dog handing, the Court of Appeals was not required to address the merits of the argument because "the trooper's evidence was not expert evidence subject to the corresponding rules of evidence and case law." The Court of Appeals said that because Trooper Escott "did not draw any inferences and submit his conclusions to the jury," he was not an expert witness and his testimony was properly admitted. The Court of Appeals erred when it concluded that Trooper Escott did not testify as an expert. Further, the Court of Appeals simply ignored the overarching argument that a court's decision to admit evidence, whether expert or lay evidence, may constitute error where it affects a substantial right of a party, and the party made a timely objection to the ruling. MRE 103(a). Such was the case here.

II. **THE TRIAL COURT VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE BY DENYING HER MOTION TO APPOINT AN EXPERT WITNESS ON EYEWITNESS IDENTIFICATION. THE TRIAL COURT ABUSED ITS DISCRETION IN DECIDING WHETHER TO APPOINT AN EXPERT BY FAILING TO EXERCISE THAT DISCRETION.**

Standard of Review

The question whether the trial court violated the defendant's Sixth Amendment right to present a defense is reviewed de novo. *Drohan, supra* at 146. In the case of a preserved constitutional error, the prosecutor must show beyond a reasonable doubt that the error did not contribute to the verdict obtained. *People v Carines,* 460 Mich 750, 774 (1999); *Anderson, supra* at 405-06, citing *Chapman, supra* at 23-24. The trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert witness is reviewed for abuse of discretion. *People v Carnicom,* 272 Mich App 614, 616 (2007). Under this standard, an abuse of discretion occurs when the decision falls outside the range of principled outcomes. *People v Babcock,* 469 Mich 247, 269 (2003).

This issue was preserved when Ms. Hill made an oral motion for appointment of an expert witness on eyewitness identification on February 12, 2008 (M1 5-6);[11] renewed that motion on February 20, 2008 (M2 4-5); and renewed it again on February 26, 2008, concurrently with a motion for a stay of proceedings to appeal the first denial (M3 3-9, 15-16, 21). The trial court entered an order denying the motion for appointment on March 4, 2008. In her interlocutory appeal, Ms. Hill argued that the trial court abused its discretion, because the court failed to exercise its discretion at all, made no inquiry into and never allowed any argument on the merits of the motion, and denied her motion on the sole basis that it was untimely. Ms. Hill further argued that the sanction of denying the motion to appoint an expert was arbitrary and

circumstances affecting the quality of view that a witness might have had or any prior familiarity with the person identified; and (2) general indications of credibility in the consistency of testimony and manner of witnesses while testifying.[13] This instruction did not address the crucial issue that Ms. Hill sought to raise: That eyewitnesses often make utterly credible identifications — sincere, honest, and even separately consistent — that nevertheless prove wholly mistaken, due to psychological factors beyond the witnesses' perception or control.[14]

Legal Standard

The trial court has discretion to appoint an expert witness, provided that the defendant can show, "that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial." MCL 775.15. To make this showing, the defendant must establish a nexus between the facts of the case and the need for an expert. *People v Jacobsen,* 448 Mich 639, 642 (1995). The defendant must show the likely

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[13] The trial court instructed the jury on this issue as follows:

> In deciding how dependable an identification is, think about such things as how good a chance did the witness have to see the offender at the time, how long the witness was watching, whether the witness had seen or known the offender before, how far away the witness was, whether the area was well-lighted, and the witness's state of mind at the time.
>
> Also, think about the circumstances at the time of the identification such as how much time had passed since the crime, how sure the witness was about the identification, and the witness's state of mind during the identification.
>
> You may also consider any times that the witness failed to identify the defendant or make an identification or gave a description that did not agree with her identification of the defendant during the trial.
>
> You should examine the witness's identification testimony carefully. You may consider whether other evidence supports the identification, because then it may be more reliable. However, you may use the identification testimony alone to convict the defendant, as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the defendant was the person who committed the crime. [T VII 22-23.]

[14] See *infra* Part II.B.

disproportionate to the purpose of enforcing compliance with a pre-trial scheduling order, and that the trial court therefore violated her constitutional right to present a defense.

Beyond her initial motion and appeal, Ms. Hill again raised this issue when she submitted as exhibits for the trial court two studies and a decision of the Sixth Circuit Court of Appeals addressing the frequency, causes, and effects of unreliable eyewitness identifications in criminal cases.[12] The trial court added these items to the court's file, but denied Ms. Hill's request to present them as exhibits for the jury. (T V 61-66.) Defense counsel nevertheless attempted to expound in his closing on the fact that scientific studies have established the unreliability of eyewitness testimony, but the prosecutor objected. (T V 79.) Ms. Hill then argued that the trial court's rulings had prevented her from presenting any substantial evidence at all to support the defense of misidentification — by denying the appointment of an expert, excluding the studies as exhibits for the jury, and finally refusing to allow her to even mention the well established and widely accepted scientific consensus on the problems with eyewitness testimony. She pointed out that excluding all evidence related to eyewitness unreliability particularly compromised her ability to put on a defense, because she had no other witnesses or evidence with which to question or impeach the credibility of the three complainants. (T V 80-85.)

Despite Ms. Hill's protests, the trial court sustained the prosecutor's objection and stated that the standard jury instruction on eyewitness identifications would suffice to advise the jury on the issue. (T V 85-87.) But this instruction could not suffice, because it addressed only (1) the

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[11] Citations to "M1," "M2," and "M3" refer to transcripts of the motion hearings held on February 12, 2008, February 20, 2008, and February 26, 2008.

[12] *Ferensic v Birkett*, 501 F3d 469 (CA6, 2007); FPT Heads of Prosecutions Comm Working Group, *Report on the Prevention of Miscarriages of Justice* (2004) (App Ex A); Nat'l Inst of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996) (App Ex B).

benefit for her case from the expert testimony, and without this showing, the trial court does not err in denying the motion without prejudice. *Id.* Although the trial court has discretion in deciding whether or not to appoint an expert, the court's failure to exercise that discretion, when properly asked to do so, is by definition an abuse of discretion. *Stafford, supra.*

The right of an accused to present a defense in a criminal trial derives from the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, and "stands on no lesser footing than the other Sixth Amendment rights . . . applicable to the States." *Ferensic v Birkett,* 501 F3d 469, 475 (CA6, 2007), quoting *Taylor v Illinois,* 484 US 400, 409 (1988). Indeed, "few rights of the accused are more fundamental than the right to present witnesses in his own defense . . . ." *Taylor, supra* at 408. The exclusion of evidence in a criminal trial violates this right where it is arbitrary or disproportionate to the purpose that the exclusion is designed to serve. *Ferensic, supra* at 475, citing *United States v Scheffer,* 523 US 303, 308 (1998). Only the most blatant and prejudicial violations of procedure, such as willful misconduct on the part of defendant or her counsel, will justify the exclusion of material evidence. *Ferensic, supra* at 476. The trial court should reserve the sanction of keeping out otherwise admissible evidence for only the most egregious cases, where lesser remedies would fail to protect the competing interests of the parties and would harm the integrity of the adversary process. *Id.*

Analysis

The trial court abused its discretion by failing to exercise its discretion, because it refused to address the merits of Ms. Hill's motion for appointment of the expert. The trial court also abused its discretion in resorting to the constitutionally arbitrary and disproportionate sanction of refusing the appointment in order to enforce its pre-trial scheduling order. Moreover, even if the denial of the motion did not constitute an abuse of discretion, it still violated Ms. Hill's Sixth Amendment right to present a defense, because it precluded her from offering crucial evidence to

support her argument that complainants misidentified her, and no other evidence could provide an adequate substitute for this expert testimony. Further, this error was not harmless, because the record showed that the jury was uncertain in its deliberations on the issue of identity.

A. The Trial Court Abused its Discretion Because it Refused to Exercise its Discretion, and Because Refusal of Appointment Was a Disproportionate and Arbitrary Means to Enforce a Pre-trial Scheduling Order.

Ms. Hill showed, as required by MCL 775.15, that she had found an expert within the jurisdiction of the court,[15] and that she could not safely proceed to trial without that expert's testimony. (M3 5-9.)[16] But the trial court refused to review the merits of the motion and instead denied it on the sole basis that it violated the court's pre-trial order, which commanded the parties to make all motions, "not later than 45 days from the date of this order or 45 days after the filing of the transcript of the preliminary examination, whichever is later." (Order Setting Time for Producing Discovery Materials and for Filing of Motions, April 9, 2007.)

In response to Ms. Hill's motion, the trial court did not inquire, nor did the prosecutor object or even speak, on the issue of whether granting the motion would cause undue delay of the trial or prejudice to the State. (Order Denying Defendant's Motion for Court Appointed Expert Witness on Eyewitness Identification, March 4, 2008.)[17] The prosecutor objected to the trial court's February 26, 2008 ruling granting a stay of proceedings for the interlocutory appeal, but stated then only that he was ready to proceed to trial and that subpoenas had been sent to witnesses who had prepared to appear the following day. (M3 25-26.) The prosecutor did not object to the motion for appointment on any basis, at any of the hearings on this issue.

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[15] Dr. Steven Miller, Ph.D., of Grosse Ile, Michigan — who defense counsel noted, "had been qualified as an expert on the issues of identification approximately 20 plus times in various courts throughout the state." (M3 9, 15-16.)

[16] See *infra* Part II.B.

Indeed, in all of the hearings on this issue, the trial court never addressed the substance of Ms. Hill's request. At the initial hearing, the court denied the motion on the sole basis that it was untimely. At the second and third hearings, the court (with a different judge presiding) denied the motion because it found that the earlier ruling had resolved the issue, and because it could not overrule a co-equal judge. (M2 5; M3 16-18.) The Court of Appeals did not address the appeal on its merits, but denied it solely because it found no need for immediate review. Ms. Hill therefore never had a fair hearing on her motion, and the trial court's failure to exercise its discretion — by refusing to even listen to the merits of her properly made and substantiated request — was by definition an abuse of discretion. See *Stafford*, *supra*. Moreover, the trial court's disregard for the substantial rights of the defendant in the absence of any prejudice to the State, and its resort to the arbitrary and disproportionate sanction of refusing to appoint a needed expert in order to enforce its pre-trial scheduling order, suffice to raise an inference of prejudice resulting from the trial court's abuse of its discretion. *Ferensic*, *supra* at 478.

B. The Trial Court's Refusal to Appoint an Expert Violated Defendant's Sixth Amendment Right to Present a Defense.

The trial court's refusal to appoint the expert violated Ms. Hill's Sixth Amendment right to present a defense, because: (1) the expert's testimony was central and indispensable to Ms. Hill's ability to effectively present her defense of misidentification; and (2) the record shows that the jurors were uncertain on the issue of identification.

First, the requested expert testimony would have provided crucial *evidence* to support the premise of defense counsel's questions and arguments advancing Ms. Hill's theory that the complainant's had misidentified her, and Ms. Hill could not effectively present her sole defense

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[17] The trial began on September 23, 2008 — more than six months later.

of misidentification without this evidence.[18] As the *Ferensic* court noted: (1) expert testimony on eyewitness reliability is now "universally recognized" as a scientifically valid aid to the jury; (2) juries tend to be "unduly receptive to" rather than skeptical of eyewitness testimony; (3) there is no longer any question that "many aspects of perception and memory are not within the common experience of most jurors, and . . . many facts that affect memory are counter-intuitive"; (4) "typical methods" and "other means" of challenging eyewitness identifications (i.e. cross-examination, impeachment, and closing arguments) cannot substitute for expert testimony on the inherent unreliability of such identifications; and (5) inaccurate eyewitness identifications have contributed more often than any other factor to the wrongful convictions of persons proven innocent and exonerated by recent advances in DNA testing. *Id.* at 481-483. Besides these general issues, the particular facts of this case also show that Ms. Hill needed expert testimony to effectively present her defense of misidentification. The evidence in this case involved: (1) a "cross-racial" identification;[19] (2) clothing that covered the attacker's head and part of her face —

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[18] See *Ferensic, supra* at 481. The *Ferensic* court emphasized that, although its holding rested on the exclusion of two witnesses related to identity, the testimony of one was not "especially strong," and excluding that testimony would not have sufficed as a "substantial and injurious error." Rather, it gave "particular emphasis" to the exclusion of the eyewitness expert:

> The significance of [the expert's] testimony cannot be overstated. Without it, the jury had no basis beyond defense counsel's words to suspect the *inherent unreliability* of the [victims'] identifications. [*Id.* at 483.] [Emphasis added.]

[19] Ms. Hill is African-American. The complainants are all Caucasian. Indeed, on cross-examination, complainant Florence Klarien provided a striking illustration of the difficulty that eyewitnesses often have discerning individual features such as skin tone in persons of a race different from their own:

> *Q.* Do you recall that when [Detective Livingston] asked you whether you could see if it was a black female or a white female?
>
> *A.* Well, it was a black, yes, I knew that.
>
> *Q.* But did you say [in your statement] it was a real black black, do you recall saying that?

the fur-lined hood (T II 70-71, 79, 114-115, 122, 131, 142); and (3) the presence of a dangerous weapon — the knife that the attacker used to menace the victims (T II 57-58, 61, 105-106, 108-110, 135). Studies have consistently shown that each of these factors can make eyewitness identifications less reliable, and this case features all three.[20]

Second, the record shows that the jury had difficulty deciding the question of guilt, and that this uncertainty must have centered on the issue of identification. Sometime soon after the jury began deliberating on October 1, 2008, the court received a request from the jury for "further testimony." The court then adjourned until the following afternoon in order to meet that request. (T VII 27-31.) This request for "further testimony" shows that the jury was uncertain in its deliberations, and because Ms. Hill disputed only the element of identity, the jury must have been uncertain on this issue. Moreover, this uncertainty establishes that the trial court's violation of Ms. Hill's Sixth Amendment right to present a defense was not harmless, because it precluded her from presenting crucial expert testimony that would likely have swayed the jury on the close question of identity. *Ferensic*, *supra* at 484.

Unlike counsel's questions and arguments, expert testimony addressing the particular hazards of misidentification in this case "would have informed the jury of *why* the eyewitnesses' identifications were *inherently unreliable*" and "would have been a scientific, professional

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A. Well, black is black.

Q. I understand that. But when we're talking about complexions of individuals —

A. Well, she wasn't a light colored black.

Q. Okay, so she was a darker color black?

A. Yeah. [T II 139-40.] [Emphasis added.

[20] Wells & Olson, *Eyewitness Testimony*, 54 Ann Rev Psychol 277, 280-82 (2003) (App Ex C).

perspective that *no one else had offered to the jury*." *Id.* at 477 (Emphasis added and in original). Moreover, this testimony was crucial to Ms. Hill's defense of misidentification, because as the jury was properly instructed, "*arguments by counsel are not evidence*." *Id.* (Emphasis added); (T VI 8). Questions and arguments of counsel cannot substitute for expert testimony that would inform the jury of the now well-established quirks of human psychology that cause eyewitnesses to routinely make sincere, unshakeable — *and completely mistaken* — identifications. *Ferensic*, *supra* at 481-482. Without this indispensable, relevant, and readily available evidence to support her arguments, Ms. Hill could not effectively present her sole defense of misidentification, and therefore could not have safely proceeded to trial.

The Court of Appeals concluded that the issue was moot and declined to address it because of its reversal of Ms. Hill's convictions based on the Confrontation Clause violation. However, in the event this Court grants the prosecution's application for leave to appeal on that issue, it should also consider this one, particularly in light of the fact that the United States Supreme Court has granted certiorari on a similar issue. The case is *Richter v Hickman,* 578 F 3d 944 (CA 9 2009), *cert granted in Harrington v Richter,* 176 L Ed 2s 108 (2010).

The Ninth Circuit determined in this murder case that trial counsel was ineffective for failing to obtain a blood spatter expert under circumstances where expert testimony was available to support the defense theory of the case and raise a reasonable doubt as to the defendant's guilt.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Naykima Tinee Hill asks this Court to grant this cross-appeal or order other appropriate relief. Defendant-Appellant Naykima Tinee Hill cross-appeals from the Court of Appeals per curiam opinion of May 11, 2010.

Respectfully submitted,

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